Chicago-Kent Law Review

Volume 13 | Issue 1 Article 2

December 1934

Some Limitations on the Remedies of the Vendor in Conditional Sales Contracts

Charles Francis Baker

CHICAGO-KENT REVIEW

Vol. XIII DECEMBER, 1934 No. 1

SOME LIMITATIONS ON THE REMEDIES OF THE VENDOR IN CONDITIONAL SALES CONTRACTS

CHARLES FRANCIS BAKER*

SOME years ago in Missouri a man by the name of Robbins commenced an action to repossess himself of a "mouse-colored mule named Ginn," alias the "Coffee mule." As told to the court the history of Ginn was as follows: One Coffee purchased the mule from Phillips, agreeing to give his note with security for the purchase price, meanwhile—until this was done—Ginn was to remain the property of Phillips. This was in the spring. The next fall Coffee gave his note to Phillips but omitted to furnish any security or co-signer. Thereafter, in the spring of the next year, Ginn was purchased by Robbins from Coffee without knowledge of the rights of Phillips. Meantime Phillips sued Coffee on the note and recovered judgment. At the instance of Phillips, the constable levied on the mule, which Phillips insisted was his, but which was in the hands of Robbins. Robbins promptly brought an action of replevin, and judgment was rendered against him in the trial court. Said the Supreme Court of Missouri on appeal:

> There is no doubt, under the rulings of this court, that personal property may be sold upon condition, and while the condition remains unperformed, the right of property does not become vested in the purchaser. . . . But it is also well settled by the

* Member of the Illinois Bar; professor of law at Chicago-Kent College of Law.

authorities . . . that, though in such cases the reserved right of the vendor may be asserted even against a purchaser *bona fide,* yet, that [sic] this cannot be done when the vendor is guilty of laches.[1]

The court, in reversing the judgment below, held that the acceptance of the note without security together with the delay in bringing suit operated as a waiver of the breach of the condition in the contract, and adjudged Ginn to Robbins.

The case, if the type of property involved be excepted, is an ordinary one. The result is to be regarded as proper in view of the failure of the vendor to assert his rights. But whence the word "laches" in an action of replevin at law? Little of equity prevails in the doctrine of caveat emptor. The inference is of the existence of a limitation on the opportunity of a vendor in a sale upon condition to avail himself of the breach of condition.

In view of language, such as that before quoted, used in opinions concerning the legal remedies of the parties to conditional sales contracts, some inquiry into the nature of the principles applied to limit these remedies may not be altogether profitless. More specifically, the scope of this undertaking is limited to a survey of the remedies of a vendor in conditional sales contracts under the varying circumstances occasioned by default of the vendee, with a view to ascertaining some of the limitations that courts have attached to these remedies. In *Robbins* v. *Phillips,* the court appeared to attach some importance to the question of whether or not the vendor acted to assert his rights with reasonable promptness. Whether this is the equitable principle of laches affecting the vendor's remedy or some legal defensive element in an equitable guise deserves examination. More directly the inquiry should be leveled at determining when delay will cost the vendor his remedy if not his right.

After a struggle, the conditional sale, as the transaction in which title is reserved as security for the payment of the price is termed, attained its present position of

[1] Robbins v. Phillips, 68 Mo. 100 (1878).

favor as a means of giving effective protection to the vendor in credit sales. It was once held in Illinois,[2] as elsewhere, that conditional sales were invalid as against purchasers who had relied upon possession as appearance of ownership to purchase without notice of the rights of the vendor. With the passage of the Uniform Sales Act by many legislatures,[3] and, in some fewer states, of the Uniform Conditional Sales Act,[4] the courts of those jurisdictions have taken the position that such contracts are not only binding as between the parties, but may be enforced by the vendor even against purchasers for value and without notice.[5] This discussion will be limited to the type of conditional sale in which the condition upon which title is to pass is the payment of the purchase price. No attempt is made to consider cases involving other special conditions.

Remedies Available to the Vendor

The vendor who has extended credit to a vendee and who has retained the title to the property as security for the performance of the condition has, upon default, several courses available. His choice will necessarily depend upon which is most advantageous under the circumstances. Ordinarily the vendor will be interested in doing one of three things. He may desire to recover the purchase price, or if this is to be paid in instalments, whatever instalments may be due. On the other hand,

[2] Gilbert v. The National Cash Register Co., 176 Ill. 288, 52 N. E. 22 (1898).

[3] Smith-Hurd Rev. St. of Ill., Ch. 121½, secs. 1-77, adopted June 29, 1915; Alabama, 1931; Alaska, 1914; Arizona, 1907; California, 1931; Connecticut, 1907; Hawaii, 1929; Idaho, 1920; Indiana, 1929; Iowa, 1919; Kentucky, 1928; Maine, 1923; Maryland, 1910; Massachusetts, 1909; Michigan, 1913; Minnesota, 1917; Nebraska, 1921; Nevada, 1915; New Hampshire, 1923; New Jersey, 1907; New York, 1911; North Dakota, 1917; Ohio, 1909; Oregon, 1909; Pennsylvania, 1916; Rhode Island, 1908; South Dakota, 1921; Tennessee, 1919; Utah, 1917; Vermont, 1921; Washington, 1926; Wisconsin, 1912; Wyoming, 1917.

[4] Alaska, 1919; Arizona, 1920; Delaware, 1919; New Jersey, 1919; New York, 1922; Pennsylvania, 1925; South Dakota, 1919; West Virginia, 1925; Wisconsin, 1919.

[5] Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N. E. 225 (1925). This decision changed the former rule in Illinois and is based upon the court's construction of sec. 23 of the Uniform Sales Act. See also Harkness v. Russell & Co., 118 U. S. 663, 30 L. Ed. 285 (1886).

the vendor may deem it better to seek to recover the specific property itself. Likewise it may be that a suit for the value of the goods will best serve his interests.

A choice of remedies will depend somewhat upon the identity of the person against whom the remedy is to be used as well as upon the purpose to be served. It may be that the goods are in the hands of a purchaser from the vendee without notice of the rights of the vendor, or that creditors of the vendee have seized them in satisfaction of debts. For purposes of clarity, the remedies of suit for the purchase price and recovery of possession will be considered as to their availability against the vendee, his creditors, and innocent purchasers of the property. Some attention must also be given, in cases where the purchase price is to be paid in instalments, to the remedies of the vendor in case of default as to a single instalment. Two other remedies are sometimes sought by a vendor after default, namely, foreclosure of seller's lien and suit for damages.

It is entirely possible also that the remedy which the vendor finally determines to employ may prove ineffectual and the question then arises whether one or more of his other remedies may be available. This raises simply the old question of election of inconsistent remedies, which must be considered, so far as any doctrine of election of remedies exists, as a limitation on the power of the vendor to assert his rights.

Right of the Vendor to Recover the Purchase Price

The right of the vendor to recover the purchase price as against the vendee is perhaps the simplest and most obvious of his rights and remedies. Where a conditional sale contract contains an express promise to pay the purchase price, no valid reason is presented why the vendor should not have this remedy. The defense usually interposed in the earlier cases was based upon the argument that since the vendor retained the title in himself, his only remedy was to retake the goods, since there was no actual sale in the sense of passing of title. This argu-

ment is easily answered, however, since the plaintiff may if he desires treat the title as having passed and proceed to enforce the contract as a contract of sale.[6] The reservation of title is treated as a reservation for security, and there can be no objection on the part of the vendee defendant if the vendor wishes to forego this advantage.[7] It is also obvious that, independent of this, the purchaser has promised to pay, and there is ample consideration for this promise.

In the ordinary conditional sale, where by its terms, the payment of the purchase price is to be made all at one time as fixed by the contract, it is clear that an action by the vendor to recover the purchase price proceeds upon the theory of an affirmance of the sale. The enforced satisfaction of the judgment is specific enforcement of the contract at law. It should also be observed that the failure of the buyer to pay one instalment of the price will give rise to an action for that instalment, the contract usually in effect so providing. The theory of such an action is, of course, an affirmance of the contract, but the title is not treated as having passed until the entire price has been paid. Many conditional sales contracts provide that after default in one instalment the vendor may at his election declare the entire purchase price due. In such case, if the vendor declares the whole amount due, he may sue for and recover that amount.

Right of the Vendor to Retake the Goods

Conditional sales contracts usually provide that the vendor may, after default, take possession of the goods. It is a general principle that the vendor has this right

[6] Utah Implement Vehicle Co. v. Kesler, 36 Ida. 476, 211 P. 1079 (1922); Swain v. Schild, 66 Ind. App. 156, 117 N. E. 933 (1917); Young v. Phillips, 203 Mich. 566, 169 N. W. 822 (1918); McCain v. Fender, 188 Ark. 1139, 69 S. W. (2d) 867 (1934); Shepard v. Mills, 173 Ill. 223, 50 N. E. 709 (1898); 12 A. L. R. 510 n.

[7] American Can Co. v. White, 130 Ark. 381, 197 S. W. 695 (1917); Arnois v. Bell, 70 Cal. App. 222, 232 P. 758 (1924); American Trust & Savings Bank v. Turner, 16 Ala. App. 602, 80 So. 176 (1918); Allen v. D. H. Ranck Pub. Co., 98 Ill. App. 44 (1900); Shepard v. Mills, 173 Ill. 223, 50 N. E. 709 (1898).

and may exercise it.[8] It seems to be accepted that this right is not dependent upon an express provision in the contract itself,[9] but that the right of the vendee to possession is contingent upon his performance of the contract in terms.[10]

As a general rule most courts have held that default in a single instalment is sufficient excuse to enable the vendor to retake possession of the goods,[11] and it is not necessary that there be an acceleration clause making the whole sum due.[12]

Contracts of this type vary frequently as to provisions with reference to taking possession and often limitations will thus be imposed upon this remedy of the vendor. These must be considered according to the facts of the individual case, and no attention is here devoted to the various ways in which the right to take possession after default may be limited by express contract. The exercise of the right, of course, involves the usual steps taken to secure possession of personal property, including peaceful recaption and statutory replevin.

Election of Remedies

Whether a retaking of the goods after default by the purchaser does or does not amount to a rescission of the contract is a question of some difficulty. Generally in contracts, after substantial breach by the promisor, the promisee may elect to treat the substantial breach as an offer to rescind which he may expressly or impliedly accept. In such case, he may maintain an action to re-

[8] Enterprise Distributing Corporation v. Zalkin, 154 Ga. 97, 113 S. E. 409 (1922); Toledo Computing Scale Co. v. Johnson, 194 Ill. App. 159 (1915); Blackford v. Neaves, 23 Ariz. 501, 205 P. 587 (1922); Peoples Nat. Bank v. Mulholland, 228 Mass. 152, 117 N. E. 46 (1917); McCargar v. Wiley, 112 Or. 215, 229 P. 665 (1924).

[9] Federal Sales Co. v. Kiefer, 273 Pa. 42, 116 A. 545 (1922); Robbins v. Phillips, 68 Mo. 100 (1878); Liver v. Mills, 155 Cal. 459, 101 P. 299 (1909).

[10] Wiggins v. Snow, 89 Mich. 476, 50 N. W. 991 (1891).

[11] Berger v. Miller, 86 Ark. 58, 109 S. W. 1015 (1908); Scott v. Glover & Co., 7 Ga. App. 182, 66 S. E. 380 (1909); Spiers v. Hubbard, 12 Ga. App. 676, 78 S. E. 136 (1913); Harden v. Lang, 110 Ga. 392, 36 S. E. 100 (1900).

[12] Spiers v. Hubbard, 12 Ga. App. 676, 78 S. E. 136 (1913).

cover the value of his performance on the theory of restitution.[13] In pursuing this remedy, the promisee must first make restitution to the promisor of anything of value which he has received.[14] In choosing the remedy for restitution, proceeding as it does upon the theory of a rescission of the contract, the promisee must not have previously maintained an action in damages for breach or for specific performance of the contract. He is not permitted both to affirm and rescind.[15]

In conditional sales contracts there is this element of difference: Since the conditional vendor has retained the title to the goods in himself, and therefore, has the title, he has the present right to possession after substantial breach.[16]

If the taking of possession of the property after default by the buyer amounts to a rescission of the contract, it follows that both parties should be returned to their original conditions, and therefore the buyer would be entitled to a return of any portion of the purchase price paid, less a reasonable amount for the use of the property. Whether or not a retaking of possession constitutes rescission depends somewhat upon the terms of the contract and somewhat upon the law, statutory and otherwise, of the particular jurisdiction.

Effect of Vendor's Election to Sue for the Price

In many jurisdictions it is held that an action brought to recover the entire unpaid purchase price constitutes such an election as will bar a subsequent recovery of the property. The cases which follow this rule seem to place the result on one of two grounds. In some jurisdictions it is held that, by bringing suit for the purchase price, the vendor waives the condition of title in himself and the

[13] Derby v. Johnson, 21 Vt. 17 (1848); Hemminger v. Western Assur. Co., 95 Mich. 355, 54 N. W. 949 (1893).

[14] Owen v. Button, 210 Mass. 219, 96 N. E. 333 (1911).

[15] Graham v. Holloway, 44 Ill. 385 (1867).

[16] Enterprise Distributing Corporation v. Zalkin, 154 Ga. 97, 113 S. E. 409 (1922).

sale becomes absolute, title passing to the vendee.[17]

In *Frisch* v. *Wells*,[18] the Supreme Judicial Court of Massachusetts in holding an action of replevin barred by a previous action for the purchase price, said:

> Under the contract, title to the replevied chattels was not to pass to the vendee, until the purchase price had been fully paid, and a bill of sale given. But after having paid a part by instalments, his failure to make other payments was a breach, which entitled the vendor, who had not broken the contract, either to treat it as an agreement for goods sold and delivered, and to sue at once for the price, or in tort for conversion, or in replevin for their specific recovery. . . . If the first remedy was used it rested upon the theory that after breach, at the election of the plaintiff, the title passed to the vendee who received and retained the property.

And in a California case[19] the court held that the effect of filing suit was to transfer and vest the title in the vendee. The theory of these cases seems to be that it is inconsistent to regard title as in the vendor and the purchase price as an absolute debt of the purchaser. Therefore, when the vendor sues for the purchase price he waives his reservation of title, and the goods vest in the buyer.

Other courts have arrived at the same result but have placed the basis of the rule upon the doctrine of election of remedies. Since upon default of the buyer, the seller may rescind or affirm the contract but cannot do both, his action for the selling price constitutes an election to affirm the sale and will bar the assertion of any inconsistent remedy.[20] In deciding these cases on the basis of an election of remedies, the courts seem generally to have been consistent with the doctrine of election of inconsistent remedies as applied in cases where fraud has

[17] Nelson v. Viergiver, 230 Mich. 38, 203 N. W. 164 (1925); Norman v. Meeker, 91 Wash. 534, 158 P. 78 (1916); United Machinery Co. v. M. Etzel & Sons, 89 Conn. 336, 94 A. 356 (1915).

[18] 200 Mass. 429, 86 N. E. 775 (1909).

[19] George J. Birkel Co. v. Nast, 20 Cal. App. 651, 129 P. 945 (1912).

[20] Alfred Fox Piano Co. v. Bennett, 96 Conn. 448, 114 A. 529 (1921).

rendered a contract voidable. In such cases the rule adhered to by many courts has been that any affirmative action on the part of the person defrauded to treat the contract as valid will constitute an election. Thus, the mere bringing of an action for damages for breach, or in tort for fraud and deceit, or suit for specific performance will constitute an irrevocable election regardless of whether prosecuted to judgment or not.[21]

There has been some disagreement as to whether or not the rule that an action for the purchase price precludes a subsequent action to recover the property applies to a contract where the price is to be paid in instalments and the seller brings suit for one or more instalments but less than the full price. In Minnesota and Oregon the rule has been adopted that by merely bringing suit for a single instalment the seller passes title to the buyer. In a recent Minnesota case,[22] the court, after stating the doctrine that suit for the purchase price brought the conditional sale to an end and vested title in the buyer, said:

> There can be no difference upon principle whether the seller seeks to recover the full amount or an instalment. . . . The principle involved is not that such a conditional sale contract is a mere lien upon the property to secure the payment of the debt, but, on the contrary, it is that the seller reserves the absolute title under which he may retake the property under certain conditions, and retain it, without any obligation to account therefor to the purchaser. Such absolute title remains in him or passes from him to the purchaser absolutely accordingly as the conditions of the sale are broken, or as they are performed, or as may result by operation of law from some act of election on the part of the seller. Nor is it practical to attempt to construe the law as meaning that the title can pass piece by piece. When the act is done that constitutes the election, it must relate not only to the immediate instalment payment but to all payments yet to

[21] Wachsmuth et al. v. Sims et al., 32 S. W. 821 (Tex. Civ. App., 1895); Stuart v. Hayden, 72 F. 402 (1895).

[22] Holmes v. Schnedler, 176 Minn. 483, 223 N. W. 908 (1929). See also Francis v. Bohart, 76 Or. 1, 147 P. 755 (1915); Eilers Music House v. Douglass, 90 Wash. 683, 156 P. 937 (1916); In re Sutton, 244 F. 872 (1917).

become due. When the election is made, it must relate to and embrace all the property involved. Such an election to collect the debt or a part thereof constitutes an election to vest title in the purchaser, and the seller is confined to the same remedy as to all subsequent instalment payments.

The conclusion of many courts on this question has been to the contrary, however. In a California case, *Silverstin* v. *Kohler*,[23] the court said:

> There is no difference in principle, in favor of the purchaser, between such recovery of the instalments due and the payment of those instalments by the purchaser without suit. The seller was not therefore put to his election between two inconsistent remedies.[24]

Upon close scrutiny, this view seems more reasonable. If the purchaser paid all of the instalments, title would vest in him at once, as though he had paid the purchase price at the time of delivery. But if he fails to pay the last instalment, his legal interest in the goods is no greater than before. It seems somewhat inconsistent to say that if the seller brings suit for an instalment, the title passes and the conditional sale is at an end, but if the buyer pays it without suit, title does not pass. To be consistent, the courts which follow the former view should hold that if the seller make demand for a single instalment, since a demand is an affirmative unequivocal act, he elects to affirm the contract and may not thereafter retake the goods. Such a view seems insupportable. If suit for a single instalment will waive the reservation of title, the intention of the parties to the contract apparently is of little importance. At least, no effect is given to the provision that title is not to pass until the purchase price is paid.

There should be no difficulty concerning the argument about title passing piecemeal, although this has apparently confused the Minnesota court. It is well established that title does not pass pro rata as the buyer pays in-

[23] 181 Cal. 51, 183 P. 451 (1919).

[24] See also Russell v. Martin, 232 Mass. 379, 122 N. E. 447 (1919); Schmidt v. Ackert, 231 Mass. 330, 121 N. E. 24 (1918); Durr v. Replogle, 167 Pa. 347, 31 A. 645 (1895).

stalments, and there is no reason for holding, when the buyer is compelled to pay an instalment by a legal remedy, that title must pass to the buyer either completely or merely as to that portion of the goods represented by the instalment. Such a rule would put a premium on delinquency, since the buyer could better his position by failing to pay instalments and inducing the seller to sue him for one instalment.

Both the view that the mere bringing of an action to collect the purchase price and the view that the prosecution of such action to final judgment constitute such an irrevocable election as will bar a subsequent retaking of the property, seem unsound as applied to conditional sales contracts. In such cases the vendee promises unequivocally to pay the purchase price and by the terms of the contract itself title is reserved by the vendor until the purchase price has been paid. It follows, therefore, that by the terms of the contract title should not pass until the vendee has performed the condition. This leads to the view that nothing short of satisfaction of a judgment for the amount due on the purchase price deprives a vendor of the right to retake the goods. This conclusion has the support of many well-reasoned decisions.[25] Any other conclusion violates the rule of construction that the intent of the parties is to govern. The parties themselves have determined that the title shall be reserved as security for the performance of an obligation. Seldom has it been held that a secured creditor loses his security by attempting to collect his debt.

Effect of Vendor's Election to Retake Goods

It seems to be fairly well settled, as a general rule, that the retaking of possession by the conditional vendor will constitute an election to rescind the contract and will bar a subsequent action for the unpaid purchase price.[26] This

[25] Vaughn v. Hopson, 10 Bush, (Ky.), 337 (1874); Ratchford v. Cayuga County Cold Storage & Warehouse Co., 217 N. Y. 565, 112 N. E. 447 (1916); Root v. Lord, 23 Vt. 568 (1851).

[26] Dasher v. Williams, 30 Ga. App. 122, 117 S. E. 108 (1923); Berlin Machine Works v. Dehlbom Lumber Co., 32 Ida. 566, 186 P. 513 (1919).

is in strict accord with the doctrine of election of remedies as referred to before. The view has been expressed in a number of cases, however, that the mere bringing of an action to retake possession is not sufficient, but that possession must be actually retaken to constitute a rescission.[27] The holdings on this point also are consistent with the general view of what constitutes an election to rescind a contract.[28]

In some jurisdictions a distinction has been drawn between a retaking of possession for the purpose of using the goods as security and retaking the goods as owner.[29] Where this view is adopted it follows that the action of the seller in taking possession of the goods, if for the purpose of using them as security, is not treated as a rescission of the contract and will not bar a subsequent action for the price.[30] This view is preferable on principle. The position of a vendor who retakes the property conditionally sold is not different from that of the seller who stops goods in transit. Reason dictates that the vendor should have the right to hold the goods for the vendee until he pays the purchase price, to sell them for his account, or actually to rescind the sale. Therefore, until the vendor does some act which demonstrates an actual intention to rescind, it should follow that his action for the price is not barred. In merely retaking the goods the seller is simply exercising his right to avail himself of security for the performance of the vendee's obligation in accordance with the terms of the contract and the true intent of the parties.[31]

Effect of Provision in Contract Against Waiver

Many forms of conditional sales contracts provide that upon default the vendor may retake possession of the

[27] Sandlin v. Maury Nat. Bank, 210 Ala. 349, 98 So. 190 (1923); Edward Thompson Co. v. Brown, 171 Minn. 483, 214 N. W. 284 (1927).

[28] Cahoon v. Fisher, 146 Ind. 583, 45 N. E. 787 (1897).

[29] Singer v. Millard, 171 Wis. 637, 177 N. W. 893 (1920).

[30] Dederick v. Wolfe, 68 Miss. 500, 9 So. 350 (1891); Matteson v. Equitable Min. & Mill. Co., 143 Cal. 436, 77 P. 144 (1904).

[31] See Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750 (1901).

goods and sell them for the account of the vendee, holding the vendee accountable for any deficiency and the reasonable expenses of the sale. Where the contract so provides many courts have held that a retaking of possession by the vendor is not a rescission of the contract and he may use the property as security and sue for the unpaid purchase price.[32] This is, of course, in theory, placing the conditional vendor in the same position as a chattel mortgagee.

Changes Effected by Statute

The Uniform Conditional Sales Act has settled the entire question of election of remedies in those jurisdictions in which it has been adopted. Section 24 of the Act provides:

> After the retaking of possession as provided in section 16 the buyer shall be liable for the price only after a resale and only to the extent provided in section 22. Neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgment in such action, nor the collection of a portion of the price, shall be deemed inconsistent with a later retaking of the goods as provided in section 16. But such right of retaking shall not be exercised by the seller after he has collected the entire price, or after he has claimed a lien upon the goods, or attracted [attached?] them, or levied upon them as the goods of the buyer.[33]

The effect of this section is two-fold. In the first place, an action for the purchase price or for any instalment thereof will not, under the act, constitute an election, so as to bar a subsequent retaking of the goods. This rests upon the theory that the reservation of title in the seller is for security only. In the second place, under the act the buyer remains liable for the purchase price after the

[32] Jefferson v. Sawyer, 206 Ala. 73, 89 So. 168 (1921); Adams v. Anthony, 178 Cal. 158, 172 P. 593 (1918); Pannell v. McGarity, 27 Ga. App. 71, 107 S. E. 352 (1921); Miller-Cahoon Co. v. Lawrence, 31 Ida. 704, 176 P. 774 (1918); Christie v. Scott, 77 Kan. 257, 94 P. 214 (1908); Minneapolis Threshing Machine Co. v. Nash, 103 Kan. 871, 176 P. 628 (1918); Jones v. Reynolds, 45 Wash. 371, 88 P. 577 (1907).

[33] 2 Uniform Laws Ann. 36.

seller has retaken the goods, but only to the extent that upon resale the goods are insufficient to bring the unpaid balance plus the expenses incident to the sale.

The position taken by the uniform act appears to be more nearly consistent with the true intention of the parties in conditional sales contracts than that of the courts that have recognized and applied the doctrine of election of inconsistent remedies. The only purpose of reserving title in the seller is to provide added security for the payment of the purchase price. If the seller loses this added security by suing for the purchase price and if he must abandon the sale when he wishes to retake possession, it follows that his added security is not worth a great deal to him. It is true that courts, by recognizing as valid provisions in contracts such as that authorizing the vendor to take possession on account of the vendee, have preserved some of the benefits incident to this type of contract. But such a result should have been arrived at even in the absence of an express provision in the contract.

In most conditional sale contracts the promise of the buyer is to pay the purchase price in dollars and cents. Such a promise is absolute and unconditional. Also, by the terms of the contract, title is not to pass until the purchase price in money has been paid. When, therefore, the buyer defaults and the vendor sues him to recover the purchase price, logically, title would not pass by the terms of the contract itself until the judgment obtained had been satisfied. Thus, since the title remains in the vendor, he should be able to retake the goods any time before satisfaction of the judgment. There would be no possibility under such an interpretation of the seller's securing both the purchase price and the goods.

It should be noted that, by the terms of the provision quoted above, the Uniform Conditional Sales Act denies the right to retake the goods to a vendor who has claimed a lien on the goods, attached them, or levied on them as the goods of the buyer. This also settled a question of some difficulty in those jurisdictions where the act has

been adopted. It has been held in a number of cases that where the vendor asserts a lien on the goods he elects to waive the reservation of title in himself and the sale becomes absolute, for the vendor cannot have a lien on his own goods.[34] But the cases are not in accord as to whether it is the mere assertion of the lien or the successful establishment of it that will defeat the subsequent action to retake the goods. In some jurisdictions it has been held that the bringing of an action to enforce a mechanic's lien on the property waives the reservation of title.[35] Other courts have held that the lien must be successfully asserted in order to bar a subsequent action for repossession.[36]

In the case of attachment there should be little room for difficulty. Where the seller attaches the property as incident to a suit for the purchase price, this should be treated as a waiver of the reserved title; but decisions have not always been uniform on this point.[37] If the seller chooses to levy on the goods as the property of the buyer, it seems scarcely open to dispute that this must amount to a waiver of the reserved title.[38]

In respect to the assertion of a lien claim, a right to attach the goods, or a levy on the goods, the position adopted by the uniform act seems stronger than that taken by the cases before mentioned.[39] In choosing voluntarily any of these remedies, the seller has unequivocably stated the goods to be the property of the purchaser, and, according to all sound principles of election of remedies, he has so affirmatively acted as to foreclose any possible step toward rescission and recovery of the

[34] Elwood State Bank v. Mock, 40 Ind. App. 685, 82 N. E. 1003 (1907); Hickman v. Richburg, 122 Ala. 638, 26 So. 136 (1899); General Fire Extinguisher Co. v. Equitable Trust Co., 17 F. (2d) 968 (1927).

[35] Kirk v. Crystal, 118 App. Div. 32, 103 N. Y. S. 17 (1907); Re Levin, Kronenberg & Co., 220 F. 451 (1915).

[36] Bierce v. Hutchins, 205 U. S. 340, 51 L. Ed. 828 (1906); Warner Elevator Mfg. Co. v. Capitol Inv. B. & L. Ass'n, 127 Mich. 323, 86 N. W. 828 (1901).

[37] Compare Heller v. Elliott, 44 N. J. L. 467 (1882) and Kirch v. LaTourette, 91 N. J. L. 34, 102 A. 873 (1918).

[38] Francis v. Bohart, 76 Or. 1, 143 P. 920 (1914), 147 P. 755 (1915).

[39] Footnotes 36 and 37.

goods. Unless familiar principles and definitions are no longer in force, it is difficult to think of a lien and an attachment as applying to any but the goods of another, whether successfully asserted or not.

Duty of Vendor to Return Payments after Retaking Goods

Whether there is a duty on the seller to return payments already made by the buyer, when he takes possession of the property is a question that will depend somewhat on the provisions of the contract and also upon whether the retaking of possession will be considered a rescission of the contract. Statutes in some jurisdictions, passed for the protection of the buyer, will also affect this question. In the absence of statute, it is the generally accepted doctrine in jurisdictions where a retaking of possession does not amount to a rescission of the contract, or where the contract itself provides for the retaking of possession for the account of the buyer, that there is no duty on the seller to refund the instalments paid as a condition to maintaining his action to recover possession of the goods.[40]

Many instalment contracts contain a clause providing that the buyer forfeits all payments made upon default. Such clauses are generally given effect where to do so is not so manifestly unjust as to be unconscionable.[41] In some jurisdictions statutes have been passed designed to lessen the harsh effects of forfeiture clauses and decisions denying the buyer credit for payments made.[42] In the Uniform Conditional Sales Act, a provision was incorporated designed to protect the buyer against any unfair operation of the rules with respect to recovery of instalments paid.[43] By the terms of this provision,

[40] Latham v. Sumner, 89 Ill. 233 (1878); Herbert v. Rhodes-Burford Furniture Co., 106 Ill. App. 583 (1902); Branstetter Motor Co. v. Silverberg, 140 Ill. App. 451 (1908); Lorain Steel Co. v. Borfolk & B. St. R. Co., 187 Mass. 500, 73 N. E. 646 (1905); Peterson v. Chess, 92 Wash. 682, 159 P. 894 (1916).

[41] Manson v. Dayton, 153 F. 258 (1907); Hine v. Roberts, 48 Conn. 267 (1880); Singer Mfg. Co. v. Treadway, 4 Ill. App. 57 (1879). Compare Sears, Roebuck & Co. v. Higbee, 225 Ill. App. 197 (1922).

[42] Tennessee and New York.

[43] Section 25, 2 Uniform Law Ann. 38.

unless the seller complies with the terms of the act with respect to the period of redemption, and with respect to resale, the buyer may recover damages, "in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest."

The doctrine of election of remedies, as has been pointed out, constitutes one of the major limitations on the remedies of the conditional vendor, as against his immediate vendee. A possible limitation arising out of delay in asserting rights after default will be considered later.

The Illinois courts are not definitely settled as to the law with respect to the principle of election of remedies in conditional sales contracts. The language used in the cases indicates an adherence to the rules followed in most jurisdictions which have been referred to already.[44] In one recent decision,[45] the Federal Circuit Court of Appeals for the Seventh Circuit passed upon the question whether a prior action for the price precluded a subsequent action to recover possession of the property, where the contract provided that the collection of the notes after default should not be considered as a waiver of title. The court held that under this provision of the contract the remedies were not inconsistent and granted the vendor's reclamation petition in the bankruptcy proceedings of the vendee. An analogy was drawn to the law of real estate mortgages, the court pointing out that in both cases the vendor can have but one satisfaction. It should be noted that this case is quoted with approval in *American Type Founders Co.* v. *Metropolitan Credit and Discount Corporation.*[46]

Rights of Conditional Vendor Against Third Persons

As against persons other than the vendee, the conditional vendor may assert rights against two classes of

[44] See Fleury & Co. v. Tufts, 25 Ill. App. 101, (1886) indicating but not holding that the vendor has a choice of remedies either to retake the goods or sue for the price.

[45] McKey v. Troy Laundry Machinery Co., 44 F. (2d) 557 (1930).

[46] 271 Ill. App. 380.

persons—purchasers from, and creditors of, the vendee. In discussing the problem of the vendor's remedies against purchasers and creditors, it is necessary to give attention first to the question of the validity of conditional sales generally against third persons having no notice of the rights of the vendor.

At common law, where the vendor reserved title in himself and did nothing which would amount to a waiver of that title, the reservation was good as against all the world, including innocent purchasers for value without notice.[47] This was so because mere possession of chattels alone, at common law, was not evidence of absolute ownership, which would raise an estoppel against the vendor who reserved title. It followed that the vendee could convey no better title than he had, and thus, could not cut off the rights of his vendor no matter how innocent his purchaser.

In Illinois, however, the courts long held that the reservation of title in the vendor was invalid against third persons who acquired interests in the property in good faith, for value, and without notice.[48] But, in 1925, the Supreme Court changed that rule by its decision in *Sherer-Gillett Company* v. *Long*.[49] In that case, the court held that since section 20 of the Uniform Sales Act recognized the validity of conditional sales contracts, and section 23 provided that in such case the vendee could pass no better right than he had, in the absence of an estoppel, the law in Illinois was changed by the force of the statutory provisions. The point covered by the decision was that the right of the conditional vendor was superior to that of an innocent purchaser from the vendee, for value and without notice. Speaking for the court, Mr. Justice Thompson said:

Before sales became a subject of uniform legislation it was settled by an overwhelming weight of authority that the seller is not

[47] In re Bowman, 28 F. (2d) 620 (1928); Stickney v. General Electric Co., 44 F. (2d) 362 (1930); Meier & Frank Co. v. Sabin, 214 F. 231 (1914).

[48] Gilbert v. The National Cash Register Co., 176 Ill. 288 (1898).

[49] 318 Ill. 432 (1925).

estopped by his conduct in delivering the possession of goods to the buyer upon a contract of conditional sale from asserting his title against one who purchases from the buyer, relying upon the apparent title of the latter, . . . but in this state we had held that a delivery of personal property to the purchaser upon a contract of conditional sale, with a retention of title in the seller, amounts to constructive fraud, which postpones the right of the real owner in favor of those who have dealt without notice with the conditional vendee, who has been given the indicia of ownership.

After this statement as to the common law rule and the rule in Illinois, the opinion discusses the provisions of sections 20 and 23 of the Uniform Sales Act, and continues:

It is a general, well-established principle that no one can transfer a better title than he has. . . . *Nemo plus juris ad alium tranferre potest quam ipse habet.* Section 23 declares, in harmony with the settled law of estoppel, that the owner of the goods may by his conduct be precluded from denying the seller's authority to sell. In order to give rise to an estoppel, however, it is essential that the party estopped shall have made by act or word a representation, and that the person setting up the estoppel shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction.

The case just discussed represents the situation in which a purchaser who bought in good faith from his seller, relying upon the apparent ownership indicated by possession and control, must lose what he has paid, upon the assertion of title by the true owner. The injustice in some cases of this situation led many legislatures to pass statutes requiring the recording or registering of conditional sales contracts, if they are to be valid against third persons without actual notice.[50] Under such stat-

[50] Alabama, Arizona, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

utes, a failure to comply strictly with the terms thereof will invalidate the reservation of title as against those for whom the statute provides protection,[51] although generally it will not affect the rights of the vendor as against his immediate vendee.[52]

It follows from what has been said that in a majority of jurisdictions, either by virtue of the common law rule that one can convey no better title than he has or by compliance with the recording statutes, the rights of the conditional vendor are preserved against bona fide purchasers from, and creditors of, the vendee.

Remedies of Conditional Vendor against Third Parties

There is, of course, no right on the part of the vendor to recover the purchase price from one who has bought the property from the vendee. Such a right would arise only by a novation or by an assumption of the debt by the purchaser in such a way as to give the vendor a contract action. One case, at least, has gone so far as to permit a recovery by the seller from such person on the strength of an express promise to pay.[53]

Since there is no right to charge a purchaser, with or without notice, for the unpaid balance of the purchase price in the absence of a promise to pay, the remedies of the conditional vendor against third persons must be limited to actions to recover the possession of the goods, or under certain circumstances their value.

Where the provisions of a recording statute have been complied with and where the vendor has done nothing to raise an estoppel against himself, he has generally the same right to take possession of the goods in the hands of the vendee's creditor or purchaser that he has against the vendee himself.[54] It follows that peaceable recaption

[51] Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773 (1929); Sparkman v. Miller-Cahoon Co., 48 Ida. 254, 282 P. 273 (1929).

[52] Creamery Package Mfg. Co. v. Horton, 165 N. Y. S. 257 (1917); Meyer Motor Car Co. v. First National Bank, 154 Md. 77, 140 A. 34 (1928).

[53] International Harvester Co. v. Stoker, 34 Pa. County Ct. 186. See also Kimball v. Jackman, 42 N. H. 242 (1860).

[54] Brown v. Fitch, 43 Conn. 512 (1876); Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N. E. 225 (1925); Benner v. Puffer, 114 Mass. 376 (1874).

or any available possessory action is open to him.

Under some circumstances the vendor has been allowed to hold a purchaser from the vendee or an attaching creditor liable in tort for a conversion of the goods. This has usually been upon the theory that the buyer has no interest in the goods until the price is paid, and acts of dominion and ownership which interfere with the rights of the vendor whether done by the vendee or one claiming through him, are acts of conversion.[55] It should be observed here that the remedies of the seller against third persons will, of necessity, be affected by the doctrine of election of remedies. If the seller has proceeded against the buyer in such a way as to pass the title to him, he will, of course, be precluded from retaking possession from one who claims through the buyer.[56] Thus, the doctrine of election of remedies acts as a limitation in this respect. In jurisdictions where the Uniform Conditional Sales Act is in force, this difficulty is obviated.

Effect of Vendor's Delay in Using His Remedies

The Idaho case of *Pease* v. *Teller Corporation*[57] deals with a phase of the problem presented by delay of the vendor in exercising his rights. In this case, an action was brought to recover a printing press from the defendant. The plaintiff's case was predicated upon a conditional sales contract providing for payment in instalments, reservation of title in the seller, the retaking of the property in case of default in any instalment, and a forfeiture of payments made. The complaint set out the contract, a failure to pay the last instalment when due, and the sale of the property and assignment of the contract to the present plaintiff. The defense relied upon, besides a general denial, was a waiver of seller's right to retake the property.

[55] A. Meister & Co. v. Harrison, 56 Cal. App. 679, 206 P. 106 (1922); Ezzard v. Frick & Co., 76 Ga. 512 (1886); Sanders v. Keber & Miller, 28 Ohio St. 630 (1876).

[56] See Mathews Piano Co. v. Markle, 86 Neb. 123, 124 N. W. 1129 (1910); Albright v. Meredith, 58 Ohio St. 194, 50 N. E. 719 (1898).

[57] 22 Ida. 807, 128 P. 981 (1912).

The defendant set out in its answer that it had paid all sums due under the contract, except the last instalment of fifty dollars, which was due May 10, 1911. It then set out that this account had been placed for collection in the hands of an attorney who made no demand for possession, but only for payment of the note. Defendant tendered the amount due six months later, and at the time of filing the answer he paid this sum into court for the use of the plaintiff. The defendant contended that this conduct constituted a waiver of the reservation of title and the right under the contract to take possession of the property. The issues so presented were tried in the court and resulted in a judgment for the defendant. The Supreme Court of Idaho, on appeal, held that the contract was a contract of conditional sale and that title would not pass until the purchase price was paid. It further held that upon the failure of the defendant to pay the amount due May 10, 1911, the right became absolute in the seller to take possession of the press. The court then announced the general doctrine of election of remedies and said that the plaintiff or his assignors had the right to enforce payment of the purchase price or retake possession of the property but that they could not do both. The court then held that the conduct of the seller amounted to a waiver of his right to rescind the contract and retake the property and affirmed the ruling of the trial court. Chief Justice Stewart said, in his opinion:

> Evidence of the intention of the seller not to rescind the contract because of default of payment, and that the time for payment was waived, is shown by the acts of the seller, in that for six months after the payment was due the seller pursued the purchaser, and attempted to collect the balance of the amount due upon said note. On the same day plaintiff made demand for the possession of the property, to wit, November 16, 1911, and, before this action was commenced, the respondent tendered to the appellant the amount due upon said note, with interest. . . . It appears from the facts of this case that it was not the intention of the appellant or his assignors on the 10th day of May, 1911,

to rescind the contract of sale, and declare a forfeiture of the provisions of the contract by reason of the failure of the respondent to make payment on that date. The failure to retake the property on that date, and no effort being made to collect the purchase price at that time, and the extension of time being extended for a period of about six months, we think entitled the respondent to notice on the part of appellant or his assignors of the election of remedy the appellant or his assignors intended to pursue.

The court seems here to base its decision upon the doctrine of election of remedies and to treat the delay of six months together with the other conduct of the seller as an election to treat the title as having passed.

The Supreme Judicial Court of Maine reached a somewhat similar conclusion in the case of *Gorham* v. *Holden.*[58] In that case, the vendee had performed the contract, except for the payment of interest. The contract provided that full payment should be a condition precedent to the passing of title. The court held that this provision was one that could be waived voluntarily by the vendor, and that since the plaintiff had allowed the defendant's testatrix to retain the property for ten years without making a demand for either interest or possession, the provision had been waived. This is not, of course, the equitable doctrine of laches, but merely the principle that unreasonable delay in asserting his rights after default may amount to a waiver of the reservation of title.

This principle, however, should be applied by the courts with some discretion. Mere delay alone should not constitute a waiver of title in the absence of other circumstances.[59] To hold that mere delay, alone, would operate to waive the reserved title would be grossly inequitable, since it would penalize the seller, who merely chose to accommodate his customer without entering into an express stipulation for an extension of time; and this, espe-

[58] 79 Me. 317, 9 A. 894 (1887).

[59] Burbank v. Crooker, 7 Gray (Mass.) 158 (1856); Langley & M. Co. v. Oka, 28 Haw. 519.

cially, since by the weight of authority a mere extension agreement does not waive the reservation of title.[60] This fact is illustrated by both the cases discussed. In *Pease* v. *Teller Corporation,* it was the delay plus the small amount due upon the contract and the tender by the purchaser that precluded a recovery of possession. In *Gorham* v. *Holden,* there had been full performance except for the payment of interest and ten years delay without even a demand for payment of interest.

A recent Ohio case is similarly explained.[61] Certain machinery had been sold under an oral conditional sales agreement. By the terms of this agreement, the purchaser was to sign written conditional sales contracts and make certain down payments upon receipt of the property. The seller delivered the property and mailed the contracts to the purchaser, who failed to sign them. The seller allowed the property to remain with the purchaser for more than a year without making any effort to reclaim it and without compelling the execution of the agreements. After the purchaser became insolvent and a receiver was appointed to take charge of its assets, the seller attempted, by intervening petition, to recover possession of the goods. The Court of Appeals of Ohio affirmed the decision of the trial court, denying a recovery on the grounds that the conduct of the seller amounted to a waiver of the conditions in the agreement, and saying that whether conduct constituted a waiver was a question of fact. The point was also made that since the written contracts were not executed, the agreement was not recorded as required by statute.

In the case of *McKey* v. *Troy Laundry Machinery Company,*[62] the Federal Circuit Court of Appeals for the Seventh Circuit held that in the absence of circumstances constituting an estoppel, the vendor was not precluded from retaking the goods by delay for any period short

[60] Duplex Printing-Press Co. v. Journal Printing Co., 1 Penn. (Del.) 565, 43 A. 840 (1899); Pelton Water Wheel Co. v. Oregon Iron & Steel Co., 87 Or. 248, 170 P. 317 (1918).

[61] E. A. Kinsey Co. v. Hall, 20 Ohio App. 131, 153 N. E. 137 (1924).

[62] 44 F. (2d) 557 (1930), C. C. A., Ill.

of the period fixed by the statutes of limitations. It seems clear, then, that mere delay alone will not prejudice the seller's right to repossess the goods. Of course, mere delay would not affect his right to sue for the price if the statute had not run.

Where the dispute is between the seller and third persons, either purchasers of the property without notice or creditors of the vendee, reasons exist for a somewhat different view of the effect of delay. In *Robbins* v. *Phillips*,[63] the court said that although a conditional sale was good as against a bona fide purchaser, yet the seller who was guilty of laches could not enforce his rights against such purchaser. In that case the condition was that a note should be furnished with good security. The court could have found that the acceptance of a note without security constituted a waiver but seemed to consider that delay for an unreasonable length of time was also determinative of the seller's rights.

The case of *Owenby* v. *Swann*[64] is a case often cited as authority for the proposition that a vendor may lose his rights by delay in proceeding to enforce them, particularly where the rights of third persons are concerned. It should be noticed that this was an equity case begun by a bill filed in a Tennessee chancery court by an innocent purchaser to recover the value of property from a vendor who had repossessed himself of the property and then sold it. Although there was evidence of collusion in the proceedings by which the vendor repossessed the property and also that the vendor had previously recovered judgment for the purchase price against a solvent surety of the buyer, the Court of Chancery Appeals of Tennessee preferred to rest its decision upon this reasoning:

> But a more complete answer to this contention, in the opinion of the writer, in the second place, is that January 24, 1894, defendant sold the mare in question to Smith, taking his note for the agreed purchase money, due in 12 months, with personal secur-

[63] 68 Mo. 100 (1878).

[64] 59 S. W. 378 (Tenn., 1900).

ity on the note, and retaining title to the mare; that he permitted this mare to remain in the possession of Smith, apparently as her full and complete owner, for over a year and a half after his note matured, without taking any steps to reclaim her for the satisfaction of his note, although there is no pretense, under the facts averred, that he could not have readily done so; that nearly three years after Smith bought the mare he sold her to Keller, who sold her to complainant, and that defendant waited until February, 1899, over 4 years after the maturity of his note, before he moved, and when he did move it was to obtain judgment against the surety on the note of his vendee, and to allow it to be stayed by solvent stayors, all this time leaving the mare to be sold to innocent parties, ignorant of his vest pocket title, and then waiting 4 months and 20 days after recovering this judgment, but before the stay of execution on it expired, before proceeding against the mare. If this delay and conduct do not amount to laches of the grossest sort, and operate as a waiver of his right involved in his retention of title, so far as innocent purchasers of the mare ignorant of his claim are concerned, the writer confesses his inability to comprehend what it takes, in contemplation of law, to constitute laches and a waiver in relation to a case of this kind.

This decision recognizes the principle of waiver referred to in discussing those cases involving vendor and vendee as between themselves, but it is to be noticed that this court is looking more at the unfairness to the innocent purchasers and their view of the conduct of the vendor than at any actual intention to treat the title as having passed. The court indeed applies the laches principle in its decision.

It should be observed, however, that mere delay alone is not what operates to deprive the seller of his rights against third persons any more than mere delay alone was sufficient as against the vendee himself.[65] It appears from an examination of the cases that only when the delay itself operates to prejudice the innocent purchaser will the vendor be deprived of his remedy. Recognizing

[65] Mitchell v. Williams, 124 So. (Miss., 1929).

this fact some courts have based their decisions in cases similar to that of *Owenby* v. *Swann* upon the doctrine of estoppel by conduct.[66]

The problem has been before the appellate courts of Illinois in several recent cases and a somewhat different method of approach by those courts justifies a separate treatment. Three cases have considered the question as it relates to the assertion of the vendor's rights against purchasers for value without notice.

In the first of these cases, *Dayton Scale Company* v. *General Market House Company*,[67] an action was brought to recover the value of certain meat slicers and scales sold by the plaintiff under conditional sales contracts to one Golas. Golas defaulted in instalments in April, 1925, and he made no payment after December, 1925. In April, 1926, the property was mortgaged to Milstin, who foreclosed the mortgage, and the property was purchased at the foreclosure sale by one Shimelfarb, from whom the defendant later acquired it through mesne conveyance. On the trial the defendant took the position that the conduct of the plaintiff estopped it from asserting title to the property. In deciding the case for the defendant the Third Division of the Appellate Court for the First District held that there was a clear analogy between a conditional sales contract and a chattel mortgage. Section 23 of the Uniform Sales Act[68] was cited to show under what circumstances the vendor might lose his rights, and the court referred to the rule in this state that

[66] Edson v. Harper Motor Co., 56 App. D. C. 241, 12 F. (2d) 182 (1926); "The vendor's right to recover the property may be lost by delay or by his estoppel to assert a right to the property in the hands of innocent third parties." Brittain, J., in Harter v. Delo, 49 Cal. App. 729, 194 P. 300 (1920). See also Knowles Loom Works v. Knowles, 22 Del. 185, 65 A. 26 (1906); Townsend v. Melvin, 21 Del. 495, 63 A. 330 (1905); Gilroy v. Everson-Hickok Co., 118 App. Div. 733, 103 N. Y. S. 620 (1907); Marston v. Baldwin, 17 Mass. 606 (1822).

[67] 248 Ill. App. 279 (1928), reversed in 335 Ill. 342 (1929) on other grounds.

[68] "Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

a chattel mortgagee who does not act promptly in reducing the property to possession after default loses his rights as against innocent third persons. The court then held that the conduct of plaintiff gave Golas an opportunity to mortgage the property, and therefore that it was estopped to assert its title against the defendant.

The matter was again before the same court in *Standard Computing Scale Company* v. *Dombrowski.*[69] In this case, property subject to conditional sale was seized by a bailiff on a judgment against the vendee, and seven or eight days after the first payment was due pursuant to the contract on judicial sale it was sold to an innocent purchaser, who, in turn, sold it to the defendant. The plaintiff brought suit three months after the sale to the defendant to recover possession of the goods. It was contended that the three months' delay in seeking to replevy the property precluded the vendor from asserting his title. The court recognized the principle of estoppel by conduct, which, in a proper case, according to the court, would cut off the vendor's rights against an innocent purchaser. But it held that the estoppel "contemplated by the Uniform Sales Act" was the conduct of the vendor while the property was in the hands of the vendee and not his conduct after the sale to an innocent purchaser, since then the vendor's conduct no longer would prejudice the innocent purchaser. The plaintiff recovered.

In *American Type Founders Company* v. *Metropolitan Credit and Discount Corporation,*[70] the Appellate Court for the First District disapproved the decision in the Dayton Scale Company case. In this case, the court held that the seller was not precluded from maintaining replevin against the purchaser's innocent mortgagee, who had bought in the property at foreclosure sale, even though at the date of the mortgage, the last of four unpaid conditional sale notes was overdue by seven months, and the seller had made no effort to repossess the property. The court ruled that to constitute an estoppel some

[69] 257 Ill. App. 409 (1930).
[70] 271 Ill. App. 380 (1933).

statement of the plaintiff must have been relied on by the defendant to its damage and that the mere delay to assert its right to repossess was equivalent to no representation whatever.

In *Silverthorne* v. *Chapman*[71] and *Haines* v. *Doss*,[72] both cited by the court in the American Type Founders Company case, the question was considered by the Appellate Court from a slightly different angle. The first case is decisive of the question of the rights of the vendor against an attaching creditor of the vendee. In this case, Silverthorne sold an automobile to Bousquet under conditional sale. Part of the purchase price, which was to be paid in monthly instalments, was paid, but the purchaser became in default and continued so for several months until the car was seized on execution upon a judgment in favor of Chapman. During all this time the car had remained in the possession of Bousquet, and at the time of seizure all but $75 of the purchase price was due. The Appellate Court for the First District held that Silverthorne was not estopped to assert his rights against Chapman for two reasons: First, the theory of an estoppel, under section 23 of the Uniform Sales Act may be invoked only by a purchaser from the vendee and not by a judgment creditor; second, there was no estoppel, because Chapman in no way relied upon the ownership of the car by Bousquet in extending credit to him. The court also repeated that an act or word relied upon by another to his damage was necessary to constitute an estoppel. The court repudiated the analogy claimed between conditional sales contracts and chattel mortgages and pointed out that it was the rule that a chattel mortgagee did not lose his rights as claimed in the Dayton Scale Company case unless and until the whole amount became due.

The case of *Haines* v. *Doss,* before mentioned, is similar on the facts to the Dayton Scale Company case and the court reaches a similar conclusion. Moreover, the case is in all respects like the Silverthorne case, save for

[71] 259 Ill. App. 289 (1930).
[72] 269 Ill. App. 179 (1933).

the fact that the entire purchase price had been due for ten months when the defendant, a judgment creditor levied on the property. The Appellate Court for the Third District decided that the failure of the vendor to assert his rights for ten months precluded him from doing so against the defendant who had no knowledge of his rights. Said the court:

> In the present case the maturity of the debt had expired 10 months prior to the levy of the execution and in our opinion appellee, having failed to exert his rights under the contract with Dubson for such a period of time, is now estopped from doing so as against the rights of appellant as a judgment creditor.

This case was called to the attention of the Appellate Court for the First District in the American Type Founders Company case but the court refused to follow it, holding that the cases were distinguishable and the issues different. The cases seem difficult to distinguish except for the fact that, in one, the rights of a purchaser, and in the other, the rights of a judgment creditor are involved.

A comparison of all these cases is not altogether satisfactory, but it would seem that so far as the Appellate Court for the First District is concerned, the law is well settled that something more than delay is necessary to cause a conditional sales vendor to lose his rights against the property in the hands of a purchaser or judgment creditor of the vendee. That court insists upon an affirmative act or representation to constitute an estoppel. The law with reference to these limitations on the remedies of conditional sales vendors herein discussed is extraordinarily lacking in uniformity of reasoning and result, although the Uniform Conditional Sales Act has served to give a logical consistency to the decisions of a few of the states.

In summary it may be said first, that in states which have not adopted the Uniform Conditional Sales Act, a majority of decisions have regarded a suit for the purchase price as an election which will bar a subsequent

action to reclaim the property sold. These decisions treat the title as passing absolutely to the vendee. As has been said, the decisions are not altogether uniform as to whether it is the beginning of such a suit or its prosecution to final judgment that constitutes the election. Where the contract provides that such action shall not operate as a waiver of the reserved title, as in the case of *McKey* v. *Troy Laundry Machinery Company*,[73] the courts have generally given effect to such provisions. Most courts seem also to have decided that a suit for one instalment other than the last, does not constitute a waiver of the reserved title.

Again, most courts have regarded the retaking of possession of the goods as such an election as will preclude a subsequent action for the purchase price. But in this respect also, a provision in the contract for the retaking for the account of the purchaser has generally been held effective.

With respect to delay in asserting his rights by the vendor, two points have been recognized. First, mere delay alone, short of the period fixed by the statute of limitations, will not prejudice the rights and remedies of the vendor against the vendee either to sue for the purchase price or to retake the property. But delay for an unreasonable length of time may be considered with other conduct of the vendor as amounting to an election to treat the title as having passed to the vendee.[74] Second, where the rights of innocent third persons are concerned, the courts regard delay in the vendor's asserting his right to retake the goods from the vendee as attended with more serious consequences. Here, most courts, although recognizing the common law principle that mere possession is not indicia of ownership, have apparently applied the equitable principle of laches, in holding that where there has been delay for an unreasonable length of time, during which third persons have acted in reli-

[73] 44 F. (2d) 557 (1930).

[74] Pease v. Teller Corporation, 22 Ida. 807, 128 P. 981 (1912); Gorham v. Holden, 79 Me. 317, 9 A. 894 (1887).

ance upon the continued possession of the vendee as the appearance of ownership, the vendor cannot pursue the property into their hands.[75] With this can be contrasted the position of the Appellate Court for the First District of Illinois in the cases of *American Type Founders Company* v. *Metropolitan Credit and Discount Corporation*[76] and *Silverthorne* v. *Chapman.*[77] This court appears to have regarded any equitable principle of laches as inapplicable in view of the provisions of section 23 of the Uniform Sales Act, and to have regarded circumstances amounting to an actual estoppel as necessary before the remedy of the vendor to retake the goods will be barred as against third persons. On the other hand, the Appellate Court for the Third District in *Haines* v. *Doss*[78] seemed to rest its decision on the doctrine of laches, although the language of the decision calls the conduct of the vendor an estoppel. This was also the doctrine of the decision of the Appellate Court for the First District in *Dayton Scale Company* v. *General Market House Company,*[79] which the court later disapproved and which the Supreme Court reversed.

In these decisions of the various jurisdictions, the difference in point of view is not easily explainable, but it might be said that some courts have maintained a strictly legal approach to the problem, while others have been influenced by the equitable view of the doctrine of bona fide purchaser for value and of laches.

[75] Owenby v. Swann, 59 S. W. 378 (1900); Robbins v. Phillips, 68 Mo. 100, (1878); Harter v. Delno, 49 Cal. App. 729, 194 P. 300 (1920).

[76] 271 Ill. App. 380 (1933).

[77] 259 Ill. App. 289 (1930).

[78] 269 Ill. App. 179 (1933).

[79] 248 Ill. App. 279 (1928), reversed in 335 Ill. 342 (1929) on other grounds.